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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1469

HOMART DEVELOPMENT CO.,
Petitioner,

vs.

ROGER JON DIAMOND, PEOPLE'S LOBBY, INC., AND WILLIAM DUXLER,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF FOR THE INTERNATIONAL COUNCIL OF SHOPPING CENTERS, INC. AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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INTEREST OF AMICUS.

The International Council of Shopping Centers, Inc. is a not-for-profit corporation. Its membership of 3600 consists of entities and individuals involved in construction, acquisition, leasing and management of shopping centers. There are approximately 13,000 shopping centers in operation in North America. They account for approximately 44% of all retail sales, exclusive of the sale of automobile and building materials. It is the only trade association representing the shopping center industry in the United States.

The Council's interest is obvious from the nature of the far-reaching majority decision of the Court below. In essence it held that the First Amendment rights of those seeking signatures on an initiative petition were superior to the right of the shopping center owner to determine and limit the uses to which its property might be put. Since the petitions had as their object the enactment of anti-pollution legislation (A. 4), and no activity of the shopping center owners was being either criticized or commented on, the decision below raises the precise question which this Court left open in *Amalgamated Food Employees* v. *Logan Valley Plaza* (391 U. S. 308, 320, fnt. 9). There this Court stated:

> "The picketing carried on by petitioners was directed specifically as patrons of the Weis Market located within the shopping center and the message sought to be conveyed to the public concerned the manner in which that particular market was being operated. We are, therefore, not called upon to consider whether respondents' property rights could, consistently with the First Amendment, justify a bar on picketing which was not thus directly related in its purpose to the use to which the shopping center property was being put."

The decision of the court below throws shopping center property open to all who wish to use it as a convenient forum and results in expropriation of private property, the access to which has heretofore been limited to those in either actual or potential business relations with the owner or tenants of the shopping center. The matter is of vital importance to shopping center owners and tenants as their income is dependent upon the ease of customer access to, and movement about in, the shopping center.

The written consents of counsel for petitioner and respondent have been filed with the Clerk of this Court.

ARGUMENT.

The considerations compelling granting of the writ are cogently set forth in the petition. We shall simply set forth a few practical observations:

Shopping centers are a response to the needs and demands of customers, the principal two of which are: (1) their need and desire for adequate parking space immediately adjacent to where they intend to make their purchases; and (2) the desire of the consumer for one-stop shopping.

The gross sales of a shopping center are so dependent upon available parking space, and land for parking is so expensive, that this *amicus* has subsidized studies by the Urban Land Institute which have concluded, that there is an optimum ratio of parking spaces to the gross leasable area of the shopping center. (Aronov, Aaron in Chain Store Age Sp. Ed. E. 41, May, 1967.) *A fortiori,* unimpeded pedestrian movement in and about the malls and shopping areas is even more important to the economic success of the center. The shopping center also bears the heavy costs of taxation and maintenance of the parking lot, malls and other common areas. It follows therefore that, as a matter of economic self-defense, shopping center owners and tenants typically prohibit non-business use of their facilities and mutually covenant that the malls and other common areas will be used solely for the purposes for which designed.

The steps which shopping center owners take to limit the use of their property to customers vary, but among the more common are: posting signs informing the public that the shopping center is private property "for use by customers only"; placing chains across entrances during non-

business hours; towing away cars parked there by non-customers; restricting employee parking to designated areas; prohibiting the placing of advertising material on cars parked in the center; and otherwise policing the area.

Viewed broadly, it is obvious that respondents' position is at bottom an attack on the fundamental right of an owner to determine and control the use to which his property is to be put and to exclude other persons from it where they endeavor to use it for purposes that conflict with the intended use. These rights, to determine use and to prevent other uses, are essential attributes of the value of property to the owner. Moreover, the argument that the right of free speech carries with it the right of access to the speaker's most favored forum, and that those rights are superior to the rights of ownership, is a limitless doctrine leading to the grossest of absurdities. At the risk of belaboring the obvious, we suggest that the right of free speech does not justify intrusion into the quiet of the reading room of a public library, nor does it afford the Lutheran a right to "demand equal time" in a Catholic church. *A fortiori*, in the private sector no rule of law or reason requires a shopping center owner to permit his tenants' stores, the malls, the parking lots and sidewalks to become a cockpit for contending factions, assorted demonstrators, or business competitors. Any such result would clearly run afoul of the Fifth Amendment and amount to nothing more than the expropriation of private property for what respondents' conceive to be public purposes. If the need for unlimited access to shopping centers be so vital to the public as respondents contend, we suggest that the constitutional method of satisfying that (we say non-existent) need would be condemnation of portions of the centers by the appropriate state authority with fair compensation to the owner, removal of the property from the tax rolls, and assumption by the public of the burdens of

maintaining it and providing police protection. If the public interest in the matter be as substantial as respondent contends, the public is not without tools to protect it in a constitutional fashion.

CONCLUSION.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 9, 1971.